

International Association of Machinists and Aerospace Workers District 186, Lodge 2533, AFL-CIO (Federal Mogul Corporation) and Herman R. Humphreys. Case 5-CB-4592

October 31, 1990

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND OVIATT

On November 24, 1989, Administrative Law Judge Claude R. Wolfe issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed exceptions, a supporting brief, and an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order as modified.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, International Association of Machinists and Aerospace Workers District 186, Lodge 2533, AFL-CIO, Blacksburg, Virginia, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Make Herman R. Humphreys whole for wages lost as a result of the Respondent's unlawful conduct in refusing to process his grievance, by paying him a sum of money equal to the increase in wages he would have received had he prevailed on his grievance. Back-

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd., 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We agree with the judge that the Respondent has failed to establish that discriminatee Humphreys' grievance lacked merit. As the judge found, there is evidence suggesting that, contrary to its contractual obligations, the Employer failed to fairly consider Humphreys for promotion and that, had it done so, a fair evaluation of Humphreys' qualifications might have resulted in a successful bid. Further, we note that there is ample arbitral authority supporting an award of backpay for a period subsequent to the contractual breach as a remedy for an employer's failure to consider an applicant fairly for a promotion. See Hill and Sinicropi, *Remedies in Arbitration* (BNA 1981) at 91-96, 141-147.

³ We agree with the General Counsel that the formula for computing the amount of backpay owed is an issue properly left to the compliance stage of the proceeding. We shall modify the recommended Order and notice to reflect this change. See *Mail Handlers Local 305 (Postal Service)*, 298 NLRB 473 (1990).

pay shall be computed as in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest as in *New Horizons for the Retarded*, 283 NLRB 1173 (1987)."

MEMBER CRACRAFT, dissenting.

Contrary to my colleagues, I would not find that Humphreys is entitled to backpay to remedy the Respondent Union's failure to pursue his grievance. I reach this conclusion for the reasons stated in my separate opinion in *Mack-Wayne II*,¹ in which I expressed the view that the burden of proof is on the General Counsel to establish that an individual's grievance was meritorious before the Board may assess backpay liability against a union that has violated its duty of fair representation. On October 31, 1988, I joined my colleagues in remanding this case to the judge.² The General Counsel's burden of proof has not been met in this case. The record on remand does not reflect that Humphreys' grievance had merit. At best, the record indicates that had the Company followed its written procedure, Quesenberry might not have obtained the trainee position. The General Counsel failed to show, however, that Humphreys would have obtained the position.³ Therefore, a backpay order is inappropriate.

¹ *Rubber Workers Local 250 (Mack-Wayne)*, 290 NLRB 817 (1988).

² See *Machinists District 186 (Federal Mogul)*, 291 NLRB 535 fn. 1 (1988).

³ This case is distinguishable from *Mail Handlers Local 305 (Postal Service)*, 298 NLRB 473 (1990), in which I concurred in an award of backpay. In *Mail Handlers*, the record demonstrated not only the company's failure to follow its own procedures, but a nexus between that failure and monetary damage to the grievant. In this case, because there is no showing that Humphreys would have obtained the trainee position if the Company had followed its procedure, I cannot find that the General Counsel has proven the grievant sustained an actual monetary loss. Similarly, the record fails to show that Humphreys would have obtained the tool grinder position if the Company had followed its posting procedure. Absent this showing, the General Counsel has not established any monetary damages, and I would not award any such damages.

APPENDIX

**NOTICE TO MEMBERS AND EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to process the grievance of Herman R. Humphreys, or any other employee, or process such grievance in a perfunctory manner, without reason or for arbitrary or invidious reasons.

WE WILL NOT inform employees that we would refuse to handle grievances of any employee who is not a member of the Union.

WE WILL NOT inform employees that we would not represent employees who are nonmembers of the Union.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Herman R. Humphreys whole for wages lost as a result of our unlawful conduct in refusing to process his grievance by paying him a sum of money equal to the increase in wages he would have received had he prevailed on his grievance, plus interest.

INTERNATIONAL ASSOCIATION OF MA-
CHINISTS AND AEROSPACE WORKERS
DISTRICT 186, LODGE 2533, AFL-CIO

Angela S. Anderson and Mark Ford Wilson, Esqs., for the
General Counsel.

Owen E. Herrnsstadt, Esq., for the Respondent Union.

Supplemental Decision

CLAUDE R. WOLFE, Administrative Law Judge. This proceeding was litigated before me at Christiansburg, Virginia, on June 13 and 14, 1989, pursuant to the Board's Decision and Order Remanding issued October 31, 1988,¹ wherein the Board adopted Administrative Law Judge James T. Youngblood's recommendation that the Union be found in violation of Section 8(b)(1)(A) of the Act because, among other things, it refused to process the grievance of Herman R. Humphreys beyond the second step of the grievance procedure contained in the collective-bargaining agreement between the Union and Federal Mogul Corporation (the Employer) because Humphreys was not a union member. Having so found, the Board remanded the case for the purpose of providing the Union an opportunity, in accord with the Board's decision in *Rubber Workers Local 250 (Mack-Wayne)*, 290 NLRB 817 (1988) (*Mack Wayne II*), to prove, at either the unfair labor practice stage or in a compliance proceeding, that Humphreys' grievance lacks merit. The Union elected to litigate the merits issue at the unfair labor practice stage. The case was then set down for hearing before me because Judge Youngblood has retired.

On the entire record, including the demeanor of the witnesses and the posttrial briefs of the parties, I make the following findings and conclusions.

Standard of Proof and Rules of Evidence

The Board found the the General Counsel has met her burden of establishing the grievance was not clearly frivolous, and noted, citing *Mack-Wayne II*, that once General Counsel meets that burden, "the burden of proof shifts to the union to establish that the grievance lacked merit."² In *Mack-Wayne II*, the Board described the union's burden as "the burden of establishing that the 5 employee's grievance would have been denied or that the discharge was justified."³ Here

no discharge is involved, but the principle remains applicable. At later points in *Mack-Wayne II*, the Board describes the union's burden as one of establishing that the grievance was not meritorious.⁴ In other decisions, the Board, citing *Mack-Wayne II*, has referred to the union's burden as one of establishing the grievances were not meritorious, but makes no reference to its description of the union's burden as one of establishing that the employees grievance would have been denied or that the conduct complained of was justified.⁵

I agree with General Counsel that the issue here is not whether Humphreys would have won if his grievance had been processed further. Consistent with the Board's discussion in *Mack-Wayne II*, I am persuaded Respondent Union's burden in the instant case is to establish Humphrey's grievance, if processed through the existing grievance procedure, would have been denied or that the failure to promote him, rather than the employees selected for promotion, was justified. As heretofore noted, Respondent Union had the option of litigating this issue at the unfair labor practice hearing or at the compliance stage. It chose the former. This does not change the fact that the purpose of this remand hearing is to ascertain the proper remedy, i.e., whether Respondent Union has any monetary liability to Humphreys for wages lost. As Board Member Johansen observed in *Mack-Wayne II*,⁶ the Board's remedial authority is based on Section 10(c) of the Act, rather than on a collective-bargaining agreement. Section 10(c) provides that the findings of the Board shall be based on the preponderance of the testimony taken. There is no indication in *Mack-Wayne II* or its progeny that the Board has elected to use a different standard in such cases, or to apply rules of evidence other than those referred to in Section 10(b) of the Act and Sections 102.39 and 102.59 of the Board's Rules and Regulations which require, so far as practicable, adherence to the rules of evidence applicable in the district courts of the United States. Accordingly, the suggestions of the parties that I employ different standards of proof or rules of evidence are rejected.

Chronological Development⁷

The chain of events leading to this proceeding began when the Employer posted a document bearing the following heading:

JOB BID SHEET

DATE & TIME POSTED: FRIDAY, SEPTEMBER 16, 1983

(In order to be eligible for consideration to bid on this position, you must sign the bid sheet within forty-eight (48) hours subsequent to the date and time posted.) The posted job must be an upgrade from your current labor grade in order to be eligible for consideration.

⁴ 290 NLRB at 820.

⁵ *Plumbers Local 195 (Bethlehem Steel)*, 291 NLRB 571 (1988); *Mailhandlers Local 305 (Postal Service)*, 292 NLRB 1216 (1989); *Oil Workers Local 5-114 (Colgate-Palmolive Co.)*, 295 NLRB 742 (1989).

⁶ 290 NLRB 820 fn. 29 (1988).

⁷ Outstanding objections raised at trial which have not been ruled on are overruled.

¹ 291 NLRB 535.

² *Machinists District 186 (Federal Mogul)*, 291 NLRB 535 (1988).

³ 290 NLRB at 819.

POSITION: TOOL & DIE TRAINEE A
 SHIFT: _____
 DEPARTMENT: TOOL ROOM LABOR GRADE 23
 EMPLOYEE NAME, DEPT. 7 SHIFT
 EMPLOYEE NAME, DEPT., SHIFT

Herman R. Humphreys and several other employees including Donnie Quesenberry signed this bid sheet. Quesenberry was the successful bidder and was promoted to the tool and die trainee job.

On December 5, 1983,⁸ Humphreys completed a grievance form which was filed with the Employer on December 6. In completing the form, Humphreys described his complaint in the following words and figures

H.R. Humphreys contends he was discriminated against when he was not given tool & die trainee job or tool grinder job, not even given interview for job. He contends he was the most qualified applicant. Supervisor says all applicants had equal qualifications, so seniority prevailed. . . .

Company violated: (a) Article XIII Section 13—training is not equal, H. E. H. has 2 years shop training more. (b) Exhibit “B” Section 2—selection will be based on . . . H. R. H. has 3 years college at V.P.I. more. (c) Article XVII Section 1—no discrimination (d) Article XXVII—laws (e) Article XXXIII no unexpressed understanding. (f) Article II—Intent.

Humphreys testified that he inserted the words “or tool grinder job” after he had completed the document and “read over it a numerous amount of times.” It is obvious on the face of the grievance these four words were inserted after the rest were written. He concedes that his reference in the grievance to a supervisor’s statement to the effect all applicants were equally qualified and seniority prevailed related to the tool and die trainee position. There is little evidence regarding the procedure that was used to fill the tool grinder vacancy, but the contract requires a posting of a notice of an opening in any job above labor grade 1. Tool grinder is at labor grade 9. Humphreys’ reference, in a sworn statement given to a Board agent during the original investigation of the underlying charge in this case, to “both lists” from each of which the first four or five bidders were given interviews does not establish a bid sheet was posted for the tool grinder. There is no evidence Humphreys signed a separate bid sheet for the tool grinder job, and I therefore cannot find that he did.

Charles Edmonds, the Employer’s personnel manager at the time of Humphrey’s grievance, credibly testified he recalls no mention of a tool grinder job during his involvement with the grievance concerning the tool and die apprentice position. He does not recall or believe that the insertion “or tool grinder job” was on the grievance at the time he responded to the grievance in step 2 of the procedure. The parties were unable to locate the original of the grievance. In view of the fact the Employers Xerox or similar system copy of the grievance contains the insertion, I conclude it existed when the Employer replied to the grievance, but I further conclude there was no discussion of the tool grinder job in Edmonds’ presence. It appears from Humphreys’ testimony

that he learned the tool grinder job had been filled by Mike Brogan when Humphreys inquired of his supervisor, Richard Dangerfield, on or about December 1, what had happened with the tool and die trainee opening. Dangerfield told him that Quesenberry had been given the job because the applicants were equally qualified and he therefore applied the contractual rule on seniority. Dangerfield then advised him of Brogan’s promotion and the award to Don Law of a grinder position to be filled later. As Humphreys described this meeting in his December 12 letter to Robert Glover, the Union’s business representative, “Almost no mention was made of the other two jobs, the tool grinders.” After this meeting with Dangerfield, Humphreys filed his grievance. I am persuaded what most probably happened is that Humphreys, bent on pursuing the tool and die trainee job, completed his grievance with that in mind, but decided to insert the reference to the tool grinder job when he learned it had been given to a tool and die trainee applicant. Judge Youngblood found, with Board approval, the grievance covered both jobs.

On December 6, Dangerfield gave his response to the written grievance: “No violation of contract, grievance denied.” This decision was then appealed to Edmonds who responded:

Selection of successful candidates for promotion is always difficult when there is more than one well qualified candidate. The selection procedure and criteria used in this case complied with the contract and established policy. Randall is considered an excellent employee and I am sure he feels that he should have been selected. However, that is no basis for a charge of contract violation and there is no contractual basis for the requested relief.

Therefore, this grievance is denied.” Thereafter, as Judge Youngblood and the Board have found, Respondent Union refused to process the grievance further because Humphreys was not a union member.

An assessment of the merits of Humphreys’ grievance must necessarily commence with the applicable provisions of the collective-bargaining agreement. Article IV, the management rights clause, provides, in relevant part, that

Unless expressly and specifically provided to the contrary in this Agreement, the management of the Company’s business at Blacksburg, Virginia, and the direction of the working forces including the planning, direction and control of operations, the scheduling of work and the assignment of employees to such work, the creation, change, or abolition of jobs or job classifications . . . are all vested solely and exclusively in the Company. It being understood however that when the Company enforces a rule, the reasonableness of the rule as well as the justification for the action taken by the Company may be raised under the grievance procedure. It is further agreed that the Company retains the right to exercise any other rights, function, or prerogative of management which is not abridged by an express and specific provision of this Agreement.

The Company retains the right . . . to transfer and to relieve employees from duty because of lack of work or other legitimate reasons except as expressly and specifically provided to the contrary in the Agreement.

⁸All dates are 1983 unless otherwise indicated.

The Company's not exercising any right hereby reserved to it or its exercising any right in a particular way, shall not be deemed a waiver of any such right or preclude the Company from exercising the same in some other way not in conflict with the express terms of this Agreement.

Article XIII, section 13, reads, in relevant part, as follows

When a job opens within a classification above Labor Grade I the Company will post in the plant a notice of such opening for forty-eight (48) hours. An active employee seeking advancement to a higher hourly rated classification . . . must sign the posting sheet during such forty-eight (48) hour period. The Company will review all employees who have declared an interest in accordance with this section. . . . When a job opens within a classification above after reviewing the applications of those who have signed the posting at the end of the above forty-eight (48) hour period among qualified applicants, the most senior will be given preference if demonstrated skill, experience and training are relatively equal.

Exhibit B to the agreement has the following relevant provisions:

SECTION 2

Applicants for training must submit applications to the Personnel Department. Openings for trainee will be filled in accordance with Article XIII, Section 13 as it relates to openings in Grade 5 or above. However, selection will be based on evaluation of past experience, job performance, demonstrated skills, education, and mechanical aptitude—all as they relate to the individual's ability to undertake selected training and successfully perform the work of this occupation. A person placed in training under these circumstances shall carry the classification of Trainee and will be enrolled in the applicable Training Program, as provided for in this Exhibit. Such employees will then be subject to the provisions and procedures contained in this Exhibit.

SECTION 3 CREDIT FOR PREVIOUS EXPERIENCE

Selected Trainees who have had applicable military training or other formal training may be allowed course curriculum training credit in accordance with the training standards after their record has been reviewed by the department supervisor and the personnel department. It shall be each applicant's responsibility to submit, in writing, verified evidence of such training.

SECTION 8

1. Each trainee must enroll and attend classes at New River Community College (or other approved school) as indicated in the applicable schedule of training provided in Section 12.

12. Each trainee must satisfactorily complete the required courses with a grade of "C" or better for credit in the program.

13. Classes other than those listed in this schedule may be substituted upon approval of the department supervisor and the personnel department.

14. Trainees will be provided with a schedule of structured experience and time for each and will be required to complete these assignments as part of their training program.

SECTION 12c(2)

TOOL & DIE TRAINEE CURRICULUM

<i>COURSE</i>	<i>CLASS HOURS</i>	<i>CREDIT HOURS</i>
Mech. J11 Introduction to Shop Op. I	8	4
Drft. 164 Mach. Blueprint Reading	3	3
Mech. K11 Intro. to Shop Op. I	8	5
Math 100 Math Calculations	4	4
Drft. 164 Blueprint Reading	3	3
Math. 107 Intro. to Eng. Tech. Math	3	3
Drft. 172 Blueprint Reading II	3	3
Mech. 170 Intro. to Numerical Control	3	3
Mech. 286 Precision Measurement	2	2
Drft. 127 U.S.A. Standard Dimensions	2	2
Math 110 Introduction to Metric System	1	1
Indt. 176 Principles of Indust. Safety	2	2
Indt. 111 Matl. & Processes of Ind.	3	3
Mech. 118 Tool Design	4	3
Math 111 Technical Math I	3	3
	53	45

Merits of the Grievance

Discussion and Conclusions

Quesenberry is senior to Humphreys by 34 days. Judge Youngblood found, and the Board adopted his finding, that Dangerfield, who did not testify, expressly told Humphreys he made the decision to give the tool and die trainee job to Quesenberry because all applicants were equally qualified and Quesenberry was senior to Humphreys. It is not clear why applicants other than Humphreys were considered as well qualified as Quesenberry, or why Quesenberry was given the job over others more senior. That Edmonds or others may now question Humphreys comparative qualifications is of no consequence because it was Dangerfield who made the selection which was endorsed by Edmonds, who noted in his written rejection of the grievance that it was difficult to select "when there is more than one well qualified candidate." The issues raised by the grievance with respect to the tool and die trainee job are Humphreys' claim he should have been interviewed before the selection of a successful bidder was made, and Humphreys' claim he was not only equally qualified but better qualified than Quesenberry. Moreover, the evidence raises an additional question. Why did not Dangerfield select Brogan or another applicant, of which there were several senior to Quesenberry, if Dangerfield considered them all equally qualified. The evidence provides no answer for this additional question.

The Employer's records contain interview evaluation sheets relative to the tool and die trainee bidders for only seven applicants including Quesenberry. The other six were all senior to Quesenberry. There were 35 bidders in all. The content of the seven evaluations, other than the names of

those evaluated, was not placed in evidence. Humphreys was not interviewed.

With respect to comparative qualifications, it appears that although their work experience differs somewhat both Quesenberry and Humphreys were excellent employees. Both were hired at the machine operator II, grade 10 level, Humphreys on June 19, 1972, and Quesenberry on May 15, 1972.⁹ Humphreys was promoted to bonding line control, grade 12 effective November 13, 1972, and became a tool cutter grinder on July 10, 1978. He remained in that capacity until August 4, 1986 when he was promoted to tool grinder, long after his grievance was filed and Judge Youngblood's decision issued. Quesenberry was promoted to setup, grade 13 on September 3, 1973. On July 21, 1975, he became a tool grinder. At some point thereafter he was a tool cutter grinder, but was again classified as a tool grinder effective February 16, 1981, where he stayed until he became a tool and die trainee A on January 2, 1984, pursuant to his successful bid. He became a tool and die maker on March 20, 1989. On the basis of their employment history and credible testimony in the record, I conclude Quesenberry had more experience than Humphreys at performing work related to the tool and die maker job. This does not, however, conclude the question of comparative qualifications. Dangerfield evidently considered Humphreys as well qualified for the tool and die apprentice job as Quesenberry, and Wirt, the union steward handling Humphreys' grievance, told Dangerfield he agreed

with Humphreys' assessment that he, Humphreys, was the most qualified applicant. In addition to his on-the-job experience for the Employer, Humphreys had acquired more than half of the 45 credits in the program from the New River Community College by successfully completing courses in the trainee curriculum set forth above, as well as additional machine shop courses not included in the trainee program. The mechanical courses he took at New River Community College included many hours of instruction and hands-on laboratory training on hand tools, drill presses, lathes, milling machines and grinders. The Employer's position, as expressed by Edmonds, is that Humphreys would have received credit for this education and training if he had been the successful bidder. Edmonds knew when bids were solicited that Humphreys was taking courses at New River, and states that education was not a determining factor because Humphrey did not get the job. This latter statement does not explain whether Humphreys' education and training at New River Community College was evaluated as article XIII, section 13 and exhibit B, section 2 to the contract seems to require preliminary to selection of applicants for training, nor does it explain whether or not this education and training were even considered by Dangerfield. So far as the record shows, Edmonds has no certain knowledge regarding exactly what evidence Dangerfield scrutinized for each applicant prior to his selection of Quesenberry.

EXHIBIT "A"

BLACKSBURG PLANT CLASSIFICATION WAGE STRUCTURE EFF. 03-19-84

LABOR GRADE	LABOR CODE	JOB CLASSIFICATION	JOB RATE TOP	START RATE STEP 1
1	LO1A1	JANITOR	7.07	6.87
2	LO2B1	FINAL PROCESSII	7.41	7.11
	LO2B2	TIN PLATER		
3	LO3C1	MAT. HAND. (AREA)	7.52	7.22
	LO3C2	LEAD PLATER		
	LO3C3	CRIB ATTEND.		
	LO3C4	MAINT. HELPER		
	LO3C5	LINE INSPECTOR		
	LO3C6	SHIPPER/RECEIVER		
4	LO4DA	MACHINE OPER. II	7.72	7.32
	LO4DS	MAT. HAND. (S/R)		
	LO4D3	MISC. MACH. OPER.		
	LO5E1	MACH. OPER. I	8.10	7.70
	LO5E2	MAT. PREP. OPER.		
	LO5E3	OILER		
6	LO6F1	PLATER CONTROL	8.29	7.89
	LO6F2	BONDING CONTROL		
	LO6F3	TOOL EXPEDITER		
7	LO7G1	GENERAL SET-UP	8.47	8.07
8	LO8H1	MAINTENANCE II	8.63	8.03
	LO8H2	TOOL CUTTER GRINDER		
9	LO9I1	TOOL GRINDER	9.39	8.79
10	L10J1	MAINTENANCE I	10.24	9.64

⁹The placement of the various positions occupied by Humphreys and Quesenberry with respect to their relative place on the promotional ladder is

shown by the following attachment to the contract. The wage increase progression is not shown because it is superfluous to this case.

EXHIBIT "A"—Continued

BLACKSBURG PLANT
CLASSIFICATION WAGE STRUCTURE
EFF. 03-19-84

LABOR GRADE	LABOR CODE	JOB CLASSIFICATION	JOB RATE TOP	START RATE STEP 1
	LI1K1 LI1K2	TOOL & DIE MAKER ELECTRICIAN	10.51	9.91

The evidence does not fairly explain (1) why Humphreys was not interviewed, (2) whether, before rejecting Humphreys' bid for tool and die trainee, the Employer considered and evaluated his education and training acquired at New River Community College as the contract's exhibit B, sections 2 and 3 appears to require, or (3) whether a fair evaluation of that education and training added to his job experience would show his qualifications to be superior to those of Quesenberry, nor (4) is it firmly established in the record that the Employer's selection of Dangerfield was not arbitrary. In this latter connection, if, as Dangerfield stated, all candidates were equally qualified, why was not a candidate senior to Quesenberry selected? All of the foregoing concerns are topics that might well be raised through the grievance procedure, which includes an arbitration provision, to ascertain whether the Employer's action was in accord with provisions of the collective bargaining agreement. The contract provides¹⁰ that an alleged grievance may involve one or both of the following:

1. A question as to fact.
2. A question as to the meaning, interpretation, or application of the terms of this agreement.

Humphreys' grievance regarding the tool and die trainee job involves questions of fact and questions of application of the contract which remain unresolved. Respondent Union has not shown by a preponderance of the evidence that Humphreys' grievance protesting Quesenberry's selection is not meritorious. This grievance may have ultimately been denied if pursued through the contractual procedure, but the evidence before me does not so show.

Turning to the question of the tool grinder job, whether it was actually discussed or not it was a subject of the written grievance even though inserted after the initial writing of the grievance by Humphreys. It was on the document when Edmonds rejected the grievance, and therefore was denied. Article XIII, section 13 requires jobs classified above level 5 be posted for bids. Tool grinder was a level 9 job. There is no evidence, other than Humphreys' vague reference to "both lists," that the tool grinder vacancy was posted for bids as the contract requires. Accordingly, I conclude Respondent Union has not proved the tool grinder grievance is not meritorious.

THE REMEDY

Respondent Union has not met its burden of proving Humphreys' grievance lacks merit, and therefore will be ordered to make him whole for wages lost as a result of Respondent's unlawful refusal to further process his grievance, by

paying him the difference between the wages he earned and the wages Quesenberry earned commencing January 2, 1984, and ending March 20, 1989, when Quesenberry ceased being a trainee and became a tool and die maker. I do not think the Respondent Unions' obligation to provide a meaningful remedy for its unfair labor practice requires it to make Humphreys whole for the wage differential between his pay as a tool grinder and Quesenberry's pay as a tool and die maker since March 20, 1989. If the grievance related only to the tool grinder job, the backpay period would reasonably terminate on August 4, 1986, when Humphreys was promoted to that job, but it does not. To speculatively conclude Humphreys would have successfully completed the training, became a tool and die maker, and continues to incur backpay entitlement until some undetermined date in the future, seems to me an uncertain and rather severe extension of the Union's obligation to a punitive rather than a make-whole remedy. It is appropriate in cases such as this that the uncertainty fall on the wrongdoer union,¹¹ but the extension of backpay liability into the unforeseeable future until such time as Humphreys may become a tool and die maker strikes me as unreasonable. For the foregoing reasons, noting that any reimbursement due him if he had only prevailed on the tool grinder grievance would have ended when he became a tool grinder, and because I believe such a remedy effectuates the purposes of the Act and fairly compensates Humphreys for losses sustained, I shall recommend the backpay period terminate on the date Quesenberry became a tool and die maker.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹²

ORDER

The Respondent, International Association of Machinists and Aerospace Workers, District 186, Lodge 2533, AFL-CIO, Blacksburg, Virginia, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Failing and refusing to process the grievances of Herman R. Humphreys, or any other employee, or processing such grievance in a perfunctory manner, without reason or for arbitrary or invidious reasons.

(b) Informing employees that it would refuse to handle grievances of any employee that was not a member of the Union.

¹¹ *Mack-Wayne II*, supra 820.

¹² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁰ Art. XIV, sec. 1.

(c) Informing employees that Respondent would not represent employees who were nonmembers of the Union.

(d) In any like or related manner restraining or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Herman R. Humphreys whole for wages lost during the period January 2, 1984, to March 20, 1989, as a result of Respondent's unfair labor practices, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(b) Post at its business office in Roanoke, Virginia, and at the premises of Federal Mogul Corporation in Blacksburg, Virginia, if the Employer is willing, and at all other places where notices to members are customarily posted, copies of

the attached notice marked "Appendix."¹³ Copies of the notice on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's representative, shall be posted by it in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

¹³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."